

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL **75-7495**

United States Court of Appeals

For the Second Circuit.

COSMO RUGGIERO,

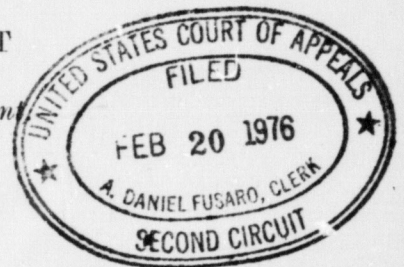
Plaintiff-Appellee,

against

KONINKLIJKE NEDERLANDSCHE STOOMBOT
MAATSCHAPPIJ N. V.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.



SUPPLEMENTAL APPENDIX.

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(GP 76-211-8352)

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41a
EXCERPTS FROM TRANSCRIPT OF TESTIMONY.

JURY SELECTION

11

1 eolt

2 THE COURT: What time did you get up?

3 ALTERNATE # 2: 5:30.

4 THE COURT: It is a long way in. Tell me, sir,
5 are you presently employed?

6 ALTERNATE # 2: Yes, sir.

7 THE COURT: What kind of work do you do?

8 ALTERNATE #2: I am an electrical engineer.

9 THE COURT: Where do you work?

10 ALTERNATE #2: IEM.

11 THE COURT: Are you married?

12 ALTERNATE #2: Yes, sir.

13 THE COURT: Is your wife employed?

14 ALTERNATE #2: No.

15 THE COURT: She works but she is not employed?

16 ALTERNATE #2: She is a housewife.

17 THE COURT: I said, she works

18 I have some general questions I ask and I
19 would appreciate it if you folks down in back would pay
20 attention also.

21 Does anyone here know Mr. Ruggiero, Cosmo
22 Ruggiero?

23 Counsel, will you have him stand? Stand up,
24 please.

25 (Plaintiff stands.)

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JURY SELECTION

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THE COURT: Does anyone know him?

All right, sit down.

Does anyone here in any way involved with the Royal Dutch Steamship Company? If you think I am going to pronounce the Dutch name for it, you're crazy, but I would assume that you would know the name if you were a stockholder or director or anything like that.

Is anyone here involved with the Royal Dutch Steamship Company?

Counsel for the plaintiff is a firm called Zimmerman & Zimmerman. Has anyone here ever have any dealings with the firm of Zimmerman & Zimmerman?

The attorney trying the case is James David Auslander. Mr. Auslander, would you stand up?

MR. AUSLANDER: Good morning.

THE COURT: Does anyone here know Mr Auslander?

Has anyone had any dealings with him?

Counsel for the defendant is Burlingham, Underwood & Lord. Has anyone here ever had any dealings with that firm?

Mr. Kimball.

MR. KIMBALL: Yes, sir.

THE COURT: William Kimball is the attorney

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JURY SELECTION

13

who will be trying the case for the defendant. Does anyone here know him?

JUROR #1: I was on a trial last week, jury duty last week, and he was the lawyer.

THE COURT: Other than that?

JUROR #1: No" sir.

THE COURT: Let's get around. You have been a juror once before, is that correct?

JUROR #1: Yes.

THE COURT: What kind of a case was it?

JUROR #1: Libel involving ships, maritime.

THE COURT: Did the case end up going to the jury for a verdict?

JUROR #1: Yes.

THE COURT: I don't want to know if there was any amount, just tell me, did you find for plaintiff or defendant?

JUROR #1: I was present for the first half of the trial and I would say it was a split decision.

THE COURT: Okay. Did you ever serve as a juror before?

JUROR #1: Not before last week.

THE COURT: How about anyone else? Anyone else ever served as a juror in a civil or criminal case or even as

JURY SELECTION

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1 eolt

2 a grand juror?

3 JUROR #2: I served in the Supreme Court in
4 White Plains in a criminal case.

5 THE COURT: What kind of a case was it?

6 JUROR #2: About four years ago. It was a
7 case involving aggravated assault, narcotics, kidnapping.

8 THE COURT: Did it go to the jury?

9 JUROR #2: yes.

10 THE COURT: What was the verdict?

11 JUROR #2: An acquittal.

12 THE COURT Ma'am?

13 JUROR #4: I served in Rockland County. It
14 was an accident case, but it was settled out of court.

15 THE COURT: How long ago was that?

16 JUROR #4: Four years ago.

17 THE COURT: Have any of you participated in a
18 lawsuit either as plaintiff or defendant or even as a
19 witness?

20 Any member of your family ever been in that
21 situation?

22 Do you know anything whatsoever about this
23 case?

24 Anyone ever talk to you about this case?

25 All right. Let me ask you to do a little mental
gyration.

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JURY SELECTION

15

Pretend for the moment that you are one of the counsel sitting at counsel table. If you were in their shoes, would you be willing to accept a person in your frame of mind, as a member of the jury? If not, I am not going to ask you why, if you don't want to serve, tell me now.

Would you be willing, if you are selected as a juror, to base your decision solely upon the evidence and the law as I instruct it?

By the way, I hope you recognize now, I will say it for openers, my instructions on the law are binding upon you. Whatever idea you might have as to the law prior to coming in here does not apply.

The jury is the sole finders of the fact and I am the sole arbitrator of the law.

Is there any reason that you feel, and I don't want to know the reason if you feel it, any reason that you feel that you cannot be totally and completely impartial in this case?

MR. AUSLANDER: If your Honor please --

THE COURT: Come on up.

(At the side bar.)

MR. AUSLANDER: I wanted to know if you're going to give the jury a brief summary of what this case is about. Longshoremen, etc.

1 eolt

2 ship?

JURY SELECTION

3 (Some jurors nod in the affirmative.)

4 THE COURT: Four jurors have indicated they know
5 the interior of an ocean-going vessel, is that correct?

6 All right.

7 THE CLERK: Juror #5 is excused.

8 Juror #5 is now Joseph P. Steembach.

9 THE COURT: Mr. Steembach, you are from Broom
10 Street down here in New York, right?

11 JUROR #5: Yes, sir.

12 THE COURT: Do you remember when fighters used
13 to be introduced as "the man from New York's lower east side"?

14 JUROR #5: No. I didn't live down there then.
15 I probably wasn't interested.

16 THE COURT: You used to live up in the Bronx?

17 JUROR #5: Right.

18 THE COURT: You and I have seen each other
19 before.

20 JUROR #5: Yes, the other day.

21 THE COURT: Indeed.

22 Now, I know the answers to most of the questions,
23 but you know the sole idea of me asking you questions is to
24 permit the attorneys to get to know you a little better.
25 That is why I do it.

JURY SELECTION

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35

exhibits which are introduced if there be any.

Now, after the plaintiff introduces the evidence, the defendant may or may not introduce evidence on behalf of the steamship company.

After that there will be closing arguments. Now, just as the opening statements are not evidence, the closing arguments are not evidence either. They are arguments by advocates. It is an attempt by each side to draw from the evidence which is introduced, certain conclusions which they try to convince you of, but it is not evidence

The hours of this particular Court are different from sixty other courts around this area. We start at 10 o'clock in the morning. We break at 12:30 for lunch.

Everybody else lets their juries go at 1 o'clock, which causes the greatest traffic jam in the restaurants around here that you can ever find. I personally hate to wait on lines and I assume that you do, too.

As I said, we will go from 10 o'clock in the morning until 12:30 and from 2 o'clock in the afternoon. I figure that the extra half hour will get you time to find a restaurant. I don't recommend any of them in this neighborhood, but maybe you would like to go over to Chinatown and the extra half hour would be sufficient for that.

We will go until 4:30. At 4:30 hopefull you

JURY SELECTION

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will be able to avoid the crush in the New York City subway system.

However, while I try to be civilized about time, I would appreciate it if you would be faithful in keeping that time. Make sure you are here at 10 o'clock in the morning.

When you go out to lunch, make sure you are back here at 2 o'clock in the afternoon. I will try my best to make sure that you get out of here, as I said, at a civilized time.

Not only do I request you to be faithful about the time, but also about your duties as jurors. I indicated before that it is my job to instruct you in the law, but it is your job and seriously you are true ministers of justice. When after I instruct you on the law you take and consider all the evidence and determine what the facts are. In this you are not to indulge in any speculation or guess work. You are not to permit any sympathy or bias either.

You are to do it strictly on the evidence and the evidence, as I said, is the testimony that you will hear from witnesses and such exhibits that are admitted into evidence.

During the course of the trial it will be the duty of each one of the attorneys to make certain objections.

eolt

JURY SELECTION

37

From time to time we might even have what is called a side bar conference over there, where you will not be able to hear it. The side bar conferences basically deal with questions of law and of logistics.

You will have sufficient to do to decide what the facts are. Don't worry about the law and the logistics, that is my problem.

Please, as jurors, pay attention. Pay strict attention. Don't, if you would, hang up your common sense in the jury room. Bring it out with you. See the witnesses and I mean that. Don't not only look, but see them. See how they testify. Figure out if what they are telling you is the truth.

We have been, I have attempted to be since this might have been your first time being selected as a juror somewhat like during the jury selection. This is, however, a serious matter. You are to treat it seriously.

Until such time as the evidence is all in and you are instructed by me at the end of the case, keep an open mind.

You came into the jury box today without any knowledge whatsoever of this case. Whatever knowledge you get will come in the form of evidence. When the time comes you base your decision on that evidence.

JURY SELECTION

38

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Please, do not discuss the case even amongst yourselves until such time as it is totally submitted to you, after I instruct you I want you to discuss the case. Prior to that, do not.

I mean not only amongst yourselves, but even do not go home and tell your husband or your wife, your boyfriend or girlfriend, whatever it might be, do not talk about it. A couple of days and you will have the rest of your life to talk about it, but until that time, do not. Keep an absolutely open mind.

If, perchance, you happen to wander into a situation where somebody else is discussing the case, walk out. If you go to a restaurant and you see one of the attorneys there, there is another restaurant down the street, go to that one. All right?

But, as I said, please keep an open mind and be as fair and impartial as both sides want you to be.

MR. AUSLANDER: If your Honor please, I don't think this jury has been sworn in.

THE COURT: That's right. Thank you for reminding me.

Now, you see, that is a situation of law and logistics. That is.

Madam Clerk, would you swear the jury in?

1 EOd

51a

2 V I N C E N Z O G E N T I L E, called as a witness by
3 the plaintiff, having first been duly sworn, testified
4 as follows:

5 DIRECT EXAMINATION

6 BY MR. AUSLANDER:

7 THE COURT: Mr. Gentile, now look, sit back and
8 relax, all right.

9 Go ahead, counsel.

10 MR. KIMBALL: If your Honor please, I didn't
11 hear any response to the oath administered by the clerk.

12 THE COURT: I did. You ought to come closer.

13 Q Mr. Gentile, where were you born?

14 A In Italy.

15 Q What do you do for a living?

16 A Longshoreman.

17 Q How long have you been a longshoreman?

18 A Twenty-six years.

19 Q Back on April 17, 1970, were you working for
20 Northeast Stevedores as a longshoreman?

21 A Yes.

22 Q Were you working at the 39th Street Pier on that
23 day?

24 A Yes.

25 Q Were you working aboard a ship called the

E0d

Gentile-direct

2

Parthenon?

A Yes, sir.

Q Were you a member of LaPore's gang?

A Yes.

Q He was the hatch boss?

A The hatch boss, yes.

THE COURT: Did you hear the answer?

MR. AUSLANDER: Sir?

THE COURT: Read back the answer.

(Answer read.)

Q Speak up loud.

THE COURT: Mr. Gentile, look, everybody in this courtroom has got to hear you all at the same time, right. Keep your voice up. It is a big room, believe it or not, you can do it.

Go ahead.

Q Make believe you are yelling at your kids.

THE COURT: Make believe you are yelling at him.

MR. AUSLANDER: All right.

Q Were you working at the No. 2 hatch that morning?

A On Deck.

Q At No. 2 hatch?

A Yes, sir.

Q What was your job on deck that morning?

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Gentile-direct

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A My job on dack is to pick the cargo from the dock and throw it in the hatch.

Q Are you what is called the signalman?

A Yes, I give the signal to the winchman to say throw it down in the cargo hold.

Q You don't really throw it down, you mean to lower it?

A Lower it, yes.

Q In other words, you stand on the deck and when you see the cargo is ready on the dock tied up and attached to the wires or the slings, you give a signal to the winchman to raise it up?

A Yes, sir.

Q And then when the time comes you give a signal to the winchman to lower it into the hatch, is that right?

A Into the hatch, yes.

Q When it is unhooked, you give a signal to the winchman to raise the wires or slings back up again over to the dock or pier to get some new cargo?

A That's right, yes.

Q Is that right?

A Yes, sir.

Q That is what your job is as a signalman?

A Signalman.

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Gentile-direct

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Q Working on the deck?

A Yes, sir.

Q On that day were there some extra men in the gang, men who were not regulars?

A Yes, sir.

Q Was Mr. Ruggiero one of those extra men?

A Yes, sir.

Q He was not a regular member of LaPore's gang, was he?

A No.

Q What time did you start working that morning?

A 8:00 o'clock in the morning.

Q About what time did the extra men come over to the ship and go to work?

A Maybe before 9:00. Maybe five or ten minutes, like that.

THE COURT: Did you hear that, counsellor?

MR. AUSLANDER: Sir?

THE COURT: Did you hear the answer?

MR. AUSLANDER: Did I, yes.

MR. KIMBALL: I did not.

THE COURT: That is what I wanted to check on.

All right. Read it back.

(Answer read.)

EOD

Gentile-direct

5

1
2 Q Now, between 8:00 o'clock and 9:00 o'clock or so,
3 what were the men in the hatch doing before Mr. Ruggiero
4 came to the ship?

5 A We start to make floor with some plywood on
6 top of the cargo that we loaded the day before.

7 Q That wasn't something that you were doing, that
8 was something that the men down in the hatch were doing, is
9 that correct?

10 A Yes, sir.

11 Q You were still up on the deck?

12 A Yes, sir.

13 Q Now, while these men down in the hatch were
14 laying the floor on top of this cargo that you said was
15 loaded the day before, was there any new cargo coming up to
16 the side of the ship on the stringpiece?

17 A Cargo.

18 Q Were they bringing any other cargo over to the
19 side of the ship to be loaded into the hatch?

20 A Yes, the cars, we start.

21 Q Automobiles?

22 A Automobiles, cars.

23 Q Cars?

24 A Yes.

25 Q They were being brought over waiting until the

EOd

Gentile-direct

6

1 floor was made, is that right?

2 A Yes, sir.

3 Q Now, about what time, approximately, about what
4 time was the first car hooked up and brought up onto the
5 ship?
6

7 A About ten, quarter after 9:00.

8 Q And the first car, was that brought right from
9 the stringpiece and carried and lowered right down to the
10 hatch or did you stop it some place first?

11 A Yes, we stopped on deck because they are not
12 ready yet to finish the floor in the hatch.

13 Q So it was landed on the deck?

14 A Yes, we land it on the deck.

15 Q How long did it sit there before you gave the
16 signal to send it down into the hatch?

17 A Five minutes.

18 Q After the car was sent into the hatch, the men
19 started to put it away, is that right?

20 A Yes.

21 Q Did you signal for a second car to come up?

22 A Yes.

23 Q And did a second car come up onto the ship? Was
24 that brought right into the hatch or was that also landed
25 on the deck first for a little while?

1 EOd
2 A We land it on the deck because they are not
3 finished yet to throw the car, you know, in the place.

4 Q How long did that sit on the deck, for a little
5 while?

6 A Three or four minutes.

7 Q Again the same amount of time about?

8 A Yes, three or four minutes, five.

9 Q Did this go on with the next three or four, five
10 cars that were brought onto the ship?

11 MR. KIMBALL: Object to leading.

12 THE COURT: Yes. Counsel, up to this point you
13 have been leading and I have permitted it, because I
14 recognize the difficulty.

15 MR. AUSLANDER: All right, your Honor.

16 THE COURT: Try not to, all right?

17 Q On the next -- the No. 3 car, the No. 4, the
18 No. 5 car, how was that brought onto the ship? Was it
19 brought straight into the hatch or did you land it again on
20 the deck like you did No. 1 and 2?

21 MR. KINBALL: Same objection.

22 THE COURT: I will permit it. Go ahead and
23 answer the question.

24 A We land it on the deck, same thing, because they
25 are not ready yet in the hold.

1 EOd

2 THE COURT: Just stop at the point when you said
3 we landed it on the deck. Okay, that answers the question.

4 MR. AUSLANDER: All right.

5 Q Now, while you were up on the deck giving the
6 signals when the cars were being brought on, was there
7 anybody from the ship standing nearby, any member of the crew
or any officer?

9 MR. KIMBALL: Object to leading.

10 THE COURT: No. I will permit it.

11 Go ahead and answer it.

12 A The mate, the second mate, whatever it is, I
13 tell him I saw some --

14 THE COURT: No.

15 Q I will come to that.

16 A All right.

17 Q Did you have a conversation, did you talk to
18 this mate about this cargo of automobiles while he was
19 standing there with you that morning?

20 A No.

21 MR. KIMBALL: Object to leading again.

22 THE COURT: He just answered "no."

23 I will permit it. The objection is overruled.

24 Q Did you say anything to this mate about anything
25 on the deck or with the cars that morning?

EOd

Gentile-direct

9

MR. KIMBALL: Object to leading.

A Yes, sir.

THE COURT: He just said no, counselor. I don't understand what you are up to.

MR. AUSLANDER: He just now said yes, your Honor.

THE COURT: All right. I will permit it at this point, but now we stop, all right?

MR. AUSLANDER: All right.

THE COURT: What did you say to him and what did he say to you?

Q What did you say to this mate?

A The mate --

THE COURT: No. Both sides, I want. What did you say to him and what did he say to you?

THE WITNESS: He told me, where you wait the car on deck, now where he at to put the car in place.

THE COURT: Yes. What did you say?

THE WITNESS: That is what I tell him, I will wait on deck, you know, they are not finished yet the floor to put the car in place.

THE COURT: All right. Did you have any further conversation? Anything else?

THE WITNESS: No.

THE COURT: That is it?

EOd

Gentile-direct

10

THE WITNESS: He told me, you wait. I tell him what I wait for, yes.

THE COURT: Okay.

Q When the cars were picked up off the deck and brought down into the hatch, did you see anything on the deck?

MR. KIMBALL: Object to leading.

THE COURT: No, it is not leading.

Q You may answer.

A Yes. I saw some spot of grease, oil where the car landed, underneath the car where it landed on deck.

Q When you saw that grease or oil or whatever it was, did you have another conversation with the mate?

A Yes, sir.

Q What did you say to him and what did he say to you?

A I tell him to put something, because I walk over here, to throw on the oil or grease or whatever it was, that is what he does. He calls somebody, the crew, he bring some sand or sawdust and throw on the oil or whatever it is.

Q Now, did you see an accident happen to Mr. Ruggiero?

MR. KIMBALL: Object to leading.

A Yes, sir.

EOD

Gentile-direct

11

THE COURT: No. Overruled.

Q About what time was that, approximately?

A Before 10:00, quarter of an hour before.

Q Where was Mr. Ruggiero at the time you saw the accident to him? Where was he standing? Where was he?

A Near the car to push the car up a little because we have got to put it in place. I don't talk too good.

Q Was he down in the hatch?

A Yes. He was near the car already to put it in place. They bounce the car and pushed it.

Q What did you see happen to him?

What did you see happen to him when you told us he was helping to put the car in place?

A I saw him slip and he fall down on the floor. Right away they stop everybody and he get up, I saw him do this (indicating), and I think he then to start to work again. He stay on the side, because he can't do good.

Q When you say "do this," you indicated rubbing your arm, that is what you saw him doing?

A Yes, he do this and then he walk away (indicating).

THE COURT: Go ahead.

MR. AUSLANDER: That is all. Thank you,

THE COURT: All right.

1

2

A Yes, they push them.

3

Q They didn't drive them?

4

A No.

5

Q Had the cars been drained before they were

6

pushed to the side of the ship?

7

A I don't know. I don't see them do that.

8

Q You didn't see that?

9

A No, I no see that.

10

Q You don't know?

11

A I don't know.

12

Q First the men down in the hold laid the floor

13

before they loaded the cars, is that right?

14

A Yes.

15

Q They didn't lay any more floor after they began

16

loading cars, did they?

17

A No.

18

Q They finished the floor before they loaded any

19

cars?

20

A That's right.

21

Q Is that right?

22

A Yes, sir.

23

Q Now, the first car was hooked up about 9:15?

24

A Yes, sir.

25

Q They brought that car up and they put it on the

deck?

EOd

1

2

A Yes, sir.

3

Q It stayed on the deck about five minutes?

4

A Yes, sir.

5

Q Then they lowered it down in the hold?

6

A Yes, sir.

7

Q Then the men began to put the car in place?

8

A Yes, sir.

9

Q What time did they finish putting the first car
10 in place?

11

A Maybe 9:00 o'clock, five after 9:00

12

Q You mean they finished stowing that car at 9:05?

13

A Yes, sir.

14

Q The one that they hooked up at 9:15?

15

A Yes, sir.

16

Q Well, about how long did it take to stow each one
17 of these cars after it got down in the hold?

18

A How long they stay?

19

Q How long to put them in place in the hold?

20

A It depends on the car. The first car, you know,
21 the first car it stay five or ten minutes and then we wait,
22 the carpenter, they got to chock the car.

23

Q Now, let's follow.

24

A All right.

25

Q Before they can get the car up on the ship they

E0d

Gentile-cross

16

1 have got to hook it up on the dock, right?

2 A Yes, sir.

3 Q They began to hook up the first car on the dock
4 at 9:15?

5 A Yes, sir.

6 Q Then the winches brought that car up, they swung
7 it over, they put it on the deck where you were working?

8 A Yes, sir.

9 Q It stayed there five minutes?

10 A Yes.

11 Q And the winches picked it up again, swing it
12 over and they lower it all the way down in the hold, right?

13 A Yes, sir.

14 Q When it gets down in the hold, the men have got
15 to unhook the car, right?

16 A Yes, sir.

17 Q Then they have got to push the car into place,
18 right?

19 A Yes.

20 Q Where were they putting the first car, under
21 the coaming?

22 A Yes.

23 Q On the side?

24 A On the side, yes.

EOd

Gentile-cross

17

1
2 Q So they have got to push it from the middle over
3 to the side?

4 A Yes, sir.

5 Q Then they have got to bounce it into position?

6 A To put it straight, the car, yes, sir.

7 Q Then the carpenters got to chock it?

8 A Yes, sir.

9 Q Meaning they have got to put lumber around it and
10 nail it?

11 A Yes, sir.

12 Q So it won't wiggle.

13 A Yes, sir.

14 Q After they finished that, then it is time to
15 bring the second car in?

16 A Yes, sir.

17 Q Is that right?

18 A Yes, sir.

19 Q Between 9:15 when they hooked up the first car
20 on the dock, and 9:45, half an hour later, how many of these
21 cars do you say they loaded from the dock to the deck and
22 from the deck into the hold and chocked? How many?

23 A Four, six.

24 Q Four or six?

25 A Six, seven, I can't remember too good.

1 EOd

2 Q Six or seven?

3 A I think like that, yes.

4 Q It could have been maybe ten?

5 A No.

6 Q Seven?

7 A Seven, eight.

8 Q Seven, eight?

9 A I don't remember exactly. I don't count the
10 cars.

11 Q Now, when you talked to this man who you thought
12 was a mate, what language did you talk to him?

13 A English, the way I talk now.

14 Q English.

15 A Broken English.

16 Q Like you are talking now?

17 A Yes.

18 Q Now, what kind of a ship was this, a Dutch ship?

19 A Dutch ship, yes.

20 Q You say you noticed some spots on the deck?

21 A Yes, sir.

22 Q When for the first time did you notice those
23 spots?

24 A After about two or three cars.

25 Q After two or three cars?

1 EOd
2 do with the safety on this ship?

3 A Yes, sir.

4 Q Is it your job, part of your job, to see that
5 everything is safe so that nobody gets hurt?

6 A Yes, sir.

7 Q That is why you give signals so that nobody is
8 going to get hurt or hit with anything, right?

9 A Yes. When they clean the hatch, I give the
10 signal to put the car down, when they have cleaned.

11 Q In other words, when everybody is out of the way?

12 A Yes, sir.

13 Q So nobody gets hurt?

14 A That is it.

15 Q Part of your job?

16 A Yes, sir.

17 Q About how far down was it from where you were
18 standing on deck to the place where the men were working
19 down in the hold? How far down was it down there?

20 A Eight and eight, about sixteen feet.

21 Q Sixteen feet?

22 A Sixteen.

23 Q I understand, sixteen feet, sixteen.

24 A Yes, sir.

25 Q Now, you say you saw something happen to

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Gentile-cross

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Mr. Ruggiero, is that right?

A Yes.

Q You just happened to be looking down there at the time?

A Yes, sir.

Q Were you looking for something in particular or did you just happen to be looking?

A I wait to finish to pick the other car. I am waiting there.

Q You are waiting?

A Yes.

Q You say you saw him slip?

A Yes, sir.

Q Did you see what it was under his foot?

A No.

Q Sixteen feet down there, did you see that?

A No, I see when he slipped.

Q Well, tell me, was he in the square or was he under the coaming?

A Half the square, in the square almost. The side of the square. The side of the ship.

Q Let me ask you, he was either in the square or out of it, which was it, in or out?

A In.

C O S M O R U G G I E R O, the plaintiff, called as a
witness in his own behalf, having first been duly
sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AUSLANDER:

Q Mr. Ruggiero --

THE COURT: Keep your voice up, please, all right?

THE WITNESS: Yes, sir.

Q Mr. Ruggiero, how old are you, sir?

A Forty-seven.

Q Were you born here in the United States?

A Pardon me?

Q Were you born here in the United States?

A Yes, sir.

Q Are you married?

A Yes, sir.

Q Do you have children?

A Yes, sir.

Q They live with you?

A Yes, sir.

Q Do you support your wife and your children?

A Yes, sir.

Q Now, what has been your occupation over the past
fifteen, twenty years?

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Ruggiero-direct

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A Longshoreman.

Q When did you first start working as a longshoreman?

A When I quit school.

Q Give me a year, how long have you been down on
the waterfront?

A About twenty-five years.

Q When you worked as a longshoreman, what kind of
jobs did you do?

A Hold man, deck man, sorter, extra laborer.

Q Everything?

A Yes.

Q In the ship, off the ship?

A Right.

Q On top and underneath, right?

A Right.

Q Are you now working as a longshoreman?

A No, sir.

Q When did you stop?

A March 20, 1971.

Q What was the cause of your stopping?

A Heart attack.

Q Are you retired now, so to speak?

A Yes, sir.

Q Because of your heart attack?

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Ruggiero-direct

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1
2 A Right.

3 Q Now, back on April 17th of 1970 had you been a
4 member of a regular gang?

5 A I was an extra man in the regular gang.

6 Q What gang?

7 A LaPore's.

8 Q LaPore was a regular gang at 39th Street Pier,
9 right?

10 A Yes, sir.

11 Q And that day you were an extra man in his gang?

12 A Yes, sir.

13 Q You got the job through the hiring hall that
14 morning?

15 A Yes, sir.

16 Q Now, were you a member of someone else's
17 regular gang who wasn't working that day?

18 A No, sir.

19 Q You were just going out to the hiring hall every
20 morning and taking jobs wherever there were vacancies, is
21 that right?

22 A That's right.

23 Q Were you working regularly before then?

24 A Yes, sir.

25 Q On April 17, 1970, you say you went to the hiring

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Ruggiero-direct

26

1 hall and they sent you to LaPore's gang?

2 A Yes, sir.

3 Q That was at 39th Street Pier?

4 A That's right.

5 Q That was for Northeast Stevedores?

6 A Pardon me?

7 Q That was for Northeast?

8 A Yes, sir.

9 Q What time, approximately, did you get to the
10 pier that morning, roughly?

11 A About 9:00, five after 9:00.

12 Q You reported to the timekeeper?

13 A Yes, sir.

14 Q He told you where to go?

15 A LaPore's gang. No. 2 on the Parthenon.

16 Q When you say No. 2, you mean to the No. 2 hatch?

17 A Yes, sir.

18 Q Now, when you got onto the ship and you climbed
19 down into the hatch, what was the gang doing at that time?

20 A Making a floor for cars.

21 Q How long did that continue before they were
22 finished, approximately?

23 A About ten, fifteen minutes.

24 Q In other words, they had already been doing that
25

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Ruggiero-direct

27

when you first arrived?

A Yes, sir.

Q And you helped them finish it up?

A Right.

Q Now, after the floor was finished, did cargo start to come down?

A Cars did.

Q Automobiles?

A Right.

Q Did you have an accident that morning in the No. 2 hatch?

A Yes, sir.

Q Approximately how many cars had come down before you had your accident?

A About four or five.

Q Now, when the car would come down, it would be landed in the center of the hatch or what is called the square, is that correct?

A Yes, sir.

Q Where, generally, were you and the other men in the gang placing those cars?

A In the after part of No. 2 hatch.

Q How far from the center, from the square, from the coaming? How far in?

1 EOd

2 Q How long was it resting there?

3 A About three or four minutes.

4 Q And then did you get behind the car and start
5 to push it forward again?

6 A Yes.

7 Q Tell us what happened?

8 A We tried to put our hands underneath the rear
9 bumper and somebody count in cadence one, two, three, and
10 we try to bounce it and push it over in place.

11 Q What happened at that time?

12 A My left foot gave way and I fell on my arm and
13 shoulder.

14 Q What did your left foot give way on or why did it
15 give way?

16 A I slipped on oil or grease.

17 Q When for the first time did you know that there
18 was any oil or grease on your shoe?

19 MR. KIMBALL: Objection, your Honor, leading.

20 THE COURT: No, I will permit it. Go ahead.

21 MR. KIMBALL: May we have a side-bar?

22 THE COURT: I will permit it.

23 MR. KIMBALL: I want to state my objection at
24 some length, not necessarily before the jury.

25 THE COURT: Sure, come on up.

1 EOd

32

2 MR. KIMBALL: I would be astounded if your
3 Honor thought the jury had and your Honor didn't stop me.
4 I don't believe the jury heard it.

5 THE COURT: I do.

6 MR. KIMBALL: I will go in the robing room,
7 which is a good place to go.

8 MR. AUSLANDER: I don't think that Mr. Kimball's
9 version of the law, although that case may stand for what
10 he says it holds, is not applicable to the facts here.
11 The witness is certainly qualified to state what was on his
12 shoe when he first saw it.

13 I will develop further what it looked like,
14 etcetera. I think these are perfectly proper questions.

15 THE COURT: I agree with you.

16 MR. AUSLANDER: All right.

17 (In open court.)

18 THE COURT: Mr. Auslander, do you make that
19 motion?

20 MR. AUSLANDER: No, I don't have the time, sir.

21 THE COURT: I don't, either.

22 BY MR. AUSLANDER:

23 Q Mr. Ruggiero, so that after the accident you
24 noticed something on your shoe. How soon after the accident
25 did you notice whatever was on your shoe was there?

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Ruggiero-direct

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A When I got up and start walking around.

3

Q What, if anything, did you notice on your shoe?

4

A Grease or oil.

5

Q What did it look like?

6

A Offhand I couldn't say.

7

THE COURT: Now, wait a second. What did it look like, what color was it?

9

THE WITNESS: Brownish-green.

10

THE COURT: All right. Did you touch it?

11

THE WITNESS: Yes, sir.

12

THE COURT: What did it feel like?

13

THE WITNESS: Slippery.

14

THE COURT: Do you want to go on with this or do you want me to do it for you?

16

MR. AUSLANDER: You can ask him.

17

THE COURT: Go ahead.

18

Q What did you do with it?

19

A I got a piece of burlap and I cleaned it.

20

Q I am sorry, I didn't hear you.

21

THE COURT: He said he got a piece of burlap and he cleaned it.

23

Q You picked your foot up and wiped it off?

24

A Yes.

25

Q Did you ever see oil or grease of this type

1 EOd
2 before?

3 A Yes.

4 Q Where have you seen it?

5 A On the deck.

6 Q What kind is that?

7 A Pardon me?

8 Q Do you have any idea where it might come from?

9 A It could have came from the deck where they
10 send the plywood down where we used to make the floor.

11 Q Did it look like anything that comes from auto-
12 mobiles?

13 A Possible.

14 MR. KIMBALL: Move to strike.

15 THE COURT: No. I will permit it.

16 Q After you got up, what did you do?

17 A I took my gloves and jacket off. I rolled up
18 my shirt sleeve and I started rubbing my arm.

19 Q What, if anything, did you notice on your arm?

20 A That it was bruised.

21 Q Did you continue working?

22 A Yes.

23 Q The rest of the day?

24 A Yes.

25 Q How did your arm feel?

1
2 A Sore, but I thought it was a charlie horse and
3 the hatch boss told me to go to the doctor.

4 THE COURT: All right, go ahead.

5 Q You finished to the end of the day?

6 A Yes.

7 Q That was when, 5:00 o'clock?

8 A 5:06.

9 Q Did you go home?

10 A Yes.

11 Q Did you do anything for your arm that night?

12 A Yes. I put hot water on it when I was showering,
13 as hot as I can stand it and I rubbed Bengay on it when I
14 came out.

15 Q Did you do anything over Saturday and Sunday?

16 A That is when I did it, Saturday and Sunday.

17 Q How did your arm feel?

18 A Sore.

19 Q On Monday morning what did your arm look like?

20 A All black and blue.

21 Q From where to where?

22 A From the elbow to the shoulder.

23 Q From where?

24 A From here to the shoulder.

25 Q You are indicating from your wrist up to your

1 EOd

2 him that?

3 THE WITNESS: Pardon me?

4 THE COURT: What did you tell him to tell him
5 that?

6 THE WITNESS: What did I tell him?

7 THE COURT: Yes.

8 THE WITNESS: I told him I hurt my arm working.

9 THE COURT: All right. I don't know if you folks
10 heard that, but the answer was, "I told him that I hurt my
11 arm working."

12 Q How did your arm look at that time?

13 A All black and blue.

14 Q Still?

15 A Yes.

16 Q How did it feel?

17 A Sore.

18 Q How sore? Can you describe it?

19 A I couldn't hardly pick it up. That is how sore
20 it was.

21 Q What, if anything, did he do for you the first
22 day?

23 A He took x-rays.

24 Q What else?

25 A And he put my arm in a sling.

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Q Did he give you any medication?

3

A He gave me some pain pills.

4

Q One kind or more than one kind?

5

A He gave me two kinds, but I don't know what they

6

were. One was pain, but I don't know what the other one

7

was.

8

Q How long did you take those pills, approximately?

9

A About a month.

10

Q How long did you keep your arm in a sling?

11

A About three or four weeks.

12

Q During those three or four weeks were you going

13

back to Dr. Tag's office?

14

A Yes.

15

Q How often?

16

A Three times a week.

17

Q On those three time a week occasions, what was

18

he doing for you?

19

A Heat treatment.

20

Q To the arm?

21

A To the arm and the shoulder.

22

Q Did he give you more pills of any kind after that

23

first three or four weeks?

24

A No.

25

Q Did you continue to carry your arm in a sling

EOd

Ruggiero-direct

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1 after those first three or four weeks?

2 A No, he took the sling off me and told me to keep
3 my arm inside my shirt.

4 Q Like Napoleon?

5 A Right.

6 Q While you were being treated by Dr. Tag those
7 three times a week, were you also doing anything for
8 yourself at home?

9 A Yes.

10 Q What were you doing?

11 A I had my own heating pad that I used to put on.

12 Q Was this as a result of anything that he suggested
13 to you to do?

14 A Yes. He suggested to me to examine my arm,
15 exercise my arm.

16 Q Now, just before the accident, in the weeks or
17 months before the accident, approximately how much money were
18 you earning a week?

19 A About \$260.

20 Q How long were you out of work altogether until
21 you went back?

22 A Eleven weeks.

23 Q During those eleven weeks that you were out of
24 work, were you paid any salary?
25

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Ruggiero-direct

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A No, sir.

Q After you went back to work, how was your arm feeling?

A Still sore.

Q In what way, explain to me how it felt when you say it was sore.

A In a working way.

Q What do you mean by "in a working way"?

A Well, I couldn't do manual labor that I wanted to do, so I used to try and look for the easiest job I could.

Q But did you continue to work?

A Yes, sir.

Q How was your arm when you would come home from work after a heavy day?

A Sore.

Q What did you do for it?

A I used to put the hot water, the heating pad and Bengay on it.

Q How often would you have to do that?

A Well, I used to do it maybe two or three times a week.

Q Did that continue up until the time you had your heart attack?

1 EOd
2 A Yes, sir.

3 Q Now, you haven't been working since your heart
4 attack?

5 A No, sir.

6 Q Despite that, how does your arm feel?

7 A Sore.

8 Q In what way?

9 A Pain, like I can pick it up, but I can't hold
10 it high long because it gets tired and I have to put it down.

11 Q How is it when you sleep?

12 A It bothers me. I twist and turn a lot. I try
13 not to sleep on my left side.

14 Q Do you take any medication now?

15 A I take heart pills.

16 Q Besides the heart pills?

17 A I take aspirins once in a while for the pain in
18 my arm.

19 Q Do you still do anything for your arm at home?

20 A Pardon me?

21 Q Do you still do anything for your arm at home?

22 A Yes. I put the hot water on it when I shower
23 and once in a while I rub Bengay on it and I put the
24 heating pad on once in a while.

25 MR. AUSLANDER: That is all. Thank you.

1 EOd

2 "Answer: It was on the plywood that was set
3 down.

4 "Question: When did you see it for the first
5 time?

6 "Answer; When I fell on it, I mean I slipped
7 on it."

8 Do you recall that?

9 A I remember.

10 Q So, in other words, the first time you saw it was
11 after you slipped?

12 A Correct.

13 Q This particular car which you were trying to
14 bounce at the time you slipped, the car was landed in the
15 square, is that correct?

16 A Yes, sir.

17 Q Then you had to unhook the chains?

18 A Yes, sir.

19 Q Then what did you next do with that car?

20 A We pushed it on the after part of the ship.

21 Q So you pushed it under the coaming?

22 A Yes, sir.

23 Q At the aft end of the hatch?

24 A That's right.

25 Q Now, when you got it there, did you stop for a

few minutes so that you could straighten out the plywood?

A No, sir.

Q What did you do after you got the car underneath the coaming?

A We tried to move it over.

Q By bounce?

A Yes, sir.

Q And was it while you were trying to move it over by bouncing that you slipped?

A Yes, sir.

Q So you pushed the car ^{under} ~~into~~ the coaming and then how many men got to the place where you were going to bounce it?

A About four or five.

Q This was at the back bumper?

A Yes, sir.

Q And you all got there at the back bumper, were there men to the left of you and men to the right of you?

A Yes, sir.

Q And you would all lift in unison and shift the car a little bit one way?

A We would try.

Q Was that the procedure?

A Yes, sir.

1 EOd
2 Q At one point Mr. Auslander was asking you
3 questions about whether you had ever before seen a substance
4 similar to that which you say you saw on your shoes later on.
5 You gave him an answer that you had seen such stuff on
6 deck. Do you remember giving that answer?

7 A Yes, sir.

8 Q Did you see any such stuff on the deck of this
9 ship?

10 A No, sir.

11 Q The place where you were working was on top of
12 cargo which covered the deck so you couldn't see the deck
13 at all, is that right?

14 A Excuse me, sir, are you talking about the deck
15 of the ship or the deck of the hold?

16 Q The deck where you were working.

17 A That is the lower hold. There is no deck.
18 There was a floor in the square to land the car and push it
19 aft and there was grease and oil in the square when we
20 pushed the car aft.

21 Q You didn't slip --

22 A You didn't specify the question.

23 Q I am sorry. You didn't slip in the square, did
24 you?

25 A No, sir.

EOd

Q About how far were you above the bottom of the lower hold when you were bouncing the cars?

A Six, seven feet high.

Q So six or seven feet below where you were working was the deck or bottom of the lower hold, is that correct?

A There was cargo underneath.

Q And that was all covered with cargo?

A That was all covered with plywood and dunnage.

Q Please follow me if you can. There was a deck, a place to walk at the bottom of the lower hold, is that correct?

A Yes, sir.

Q On top of that somebody had put about six foot high of cargo, is that so?

A About five or six feet.

Q Then on top of that cargo a floor of plywood and dunnage had been laid, is that correct?

A That is right, sir.

Q And you were working on top of that floor of plywood and dunnage some five or six feet above the deck of the lower hold, is that correct?

A That is correct.

Q And you saw no grease or oil or anything else on

1 EOd
2 the deck of the lower hold because you couldn't even see
3 the deck, could you?

4 A It was on the plywood, not the deck.

5 Q In the square, you say?

6 A In the square.

7 Q The following Monday, that would be the 20th of
8 April, is that correct?

9 A That is correct.

10 Q You say you went to work?

11 A That is right.

12 Q Did you go to work at the same pier?

13 A Yes, sir.

14 Q Did you shape first before you went there?

15 A Yes, sir.

16 Q Because you were not a regular at that pier,
17 you were an extra, is that correct?

18 A That is correct.

19 Q So Monday you went to the hiring hall and shaped
20 and it so happened they sent you back to the same pier?

21 A I got hired for the same pier.

22 Q Where there was the same timekeeper and the same
23 hatch boss?

24 A Yes, the same gangs are there.

25 Q The same gang.

EOd

Ruggiero-cross

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fallen on your arm and shoulder?

A Yes.

Q Do you recall this answer to this question on
Page 25, Line 4:

"Question: Did you tell the timekeeper that
you had slipped on grease or oil?

"Answer: Yes, sir, I did."

Do you recall that answer to that question?

A Now, I do.

Q Then later on I asked you a question.

"Question: Did you tell the timekeeper that
you had fallen on your arm and shoulder?

And you answered, "Yes," then, and you answered
"yes," a moment ago, is that correct?

A Yes, sir.

MR. KIMBALL: I ask that this piece of paper
be marked for identification.

(Defendant's Exhibit A marked for identification.)

MR. KIMBALL: Your Honor, may I show the
witness A?

THE COURT: Sure.

Q I show you this piece of paper marked A,
Mr. Ruggiero, and I ask you only one question. Is that
your signature where I have my finger?

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(Trial continued.)

(In open court; jury present.)

THE COURT: You may not believe it, ladies and gentlemen, between 10:00 o'clock and the time you were called out here, I tried another case. I am not kidding.

MR. AUSLANDER: I will vouch for it.

THE COURT: I know, you sat through it.

Call your next witness, please.

MR. AUSLANDER: Dr. Campbell, please.

EDWIN CAMPBELL, called as a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AUSLANDER:

Q Doctor, are you duly licensed to practice medicine in the State of New York?

A Yes.

Q Would you please tell the Court and jury when you were first so licensed?

A December 1953.

Q Would you please tell the Court and jury what your medical training and background is?

A Graduated New York Medical College, 1952.

Surgical resident at Brooklyn Veterans Hospital,
'53 to '54.

Surgical resident and chief surgical resident in general surgery and trauma at Harlem Hospital Center, 1955 to 1958.

Assistant attending in surgery at French Polyclinic Medical School and Health Center.

Assistant attending in surgery and director --
assistant director of hand surgery at Seidham Hospital.

Physician for the metropolitan division of the
Amateur Athletic Union.

Q Doctor, you mentioned in a couple of -- in some of your background that you were assistant or attending physician in surgery and trauma. What is trauma?

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Campbell-direct

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1 A Trauma is any injury or violation of the
2
3 continuity of the body.

4 Q Do we commonly to the layman think of that as
5 some type of accident to the body, an injury by accident?

6 A Yes.

7 Q Rather than from some disease?

8 A Yes.

9 Q So if I have a problem from trauma, it's because
10 of an accident rather than from some disease, is that correct?

11 A That is correct.

12 Q Doctor, you mentioned that you are affiliated
13 with the New York State Athletic Commission. What is your
14 function with that Commission?

15 A I am responsible for examining all boxers and
16 wrestlers yearly for licensing and I am also responsible for
17 examining them before and certifying them as capable of
18 engaging in their activities previous and on the day of the
19 activity.

20 I am the ringside physician at the boxing matches
21 and I determine if there are medical reasons for stopping it
22 or permitting it to go on and I treat them.

23 Q Were you at the Garden Monday night for the fights?

24 A Yes.

25 Q That championship fight, Monson and Galindez?

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Campbell-direct

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substance on board floor and fell, striking the left arm and shoulder.

THE COURT: Doctor, that is what he told you? You weren't there to see it, right?

THE WITNESS: No, sir.

THE COURT: Okay.

Q Doctor, let me ask you this: Is it important sometimes for a doctor to get a history of the way a patient claims an accident happened so that he may better be able to examine for the injury and to find out the mechanics of how something might have come about? Is that the purpose of taking histories?

A Yes.

THE COURT: Doctor, the only people who don't take histories are veterinarians, is that right?

THE WITNESS: That is right.

Q Doesn't the home owner sometimes --

MR. AUSLANDER: Forget it.

Q Now, did he tell you what his condition was, physical condition of his arm, when he first went to see Dr. Tagliagambe?

MR. KIMBALL: Same objection, your Honor.

THE COURT: No, I will permit it.

A Yes, he said that the arm was swollen and black

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Campbell-direct

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and blue from the wrist up to the elbow and from the elbow up to the shoulder.

Q Did you see the official diagnosis by Dr. Tagliagambe at the time that you were examining Mr. Ruggiero?

A Yes, I did.

Q Was this the official diagnosis that Dr. Tagliagambe sent to the Department of Labor?

A Yes.

Q You saw that report?

A I saw that report, yes.

Q Would you tell us what the diagnosis was that Dr. Tagliagambe made concerning this man's injury at that time of his initial treatment?

MR. KIMBALL: Heresay and best evidence.

THE COURT: Do we have a copy of the new Federal Rules of Evidence?

I will permit it. Go ahead.

Q You may answer, Doctor.

A The diagnosis on the Labor Department report was acute sprain of the left shoulder and left arm, with induration and ecchymosis extending to the volar aspects --

THE COURT: Wait a second, hold on. I might know what you mean.

MR. MUSLANDER: I am going to break that down, your Honor, as soon as he gives the diagnosis. I will break it down piecemeal.

THE COURT: All right.

A Extending to the volar aspect of the left forearm.

Q Now, let us just break that down. You start off with acute sprain of the left shoulder and left arm. What is an acute sprain and is there any other kind of sprain?

A Yes, there is a chronic sprain.

Q What does acute sprain mean?

A Acute sprain is something that has happened recently.

Q Does it have anything to do with severity?

A No, not necessarily.

Q So he had a sprain of the left shoulder and arm.

A Yes.

Q What is a sprain?

A A sprain is a tear or partial tear or complete tear of ligaments.

Q The ligaments do what?

A The ligaments in this particular case maintain the shoulder, the integrity of the shoulder, or maintain the arm in its proper relationship with the shoulder.

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Campbell-direct

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Q The man testified and assume that he has, Doctor, because you weren't here, that he had trouble in lifting the hand and it was painful. Would that be consistent with that diagnosis of a tear of the ligaments?

A Yes.

Q Now, the next portion is with induration. What does induration mean?

A Induration means, you can describe it as a hardness and a swelling and a type of hardness that can be pitted by sticking your finger in and the indentation will remain. It is due to an extravasation of blood.

Q What do you mean by extravasation?

A That is bleeding into tissues.

Q Is that another name for a hemorrhage in the arm?

A Yes.

Q We come next to an ecchymosis. What is ecchymosis?

A Ecchymosis is bleeding under the skin primarily.

THE COURT: A bruise, isn't it?

THE WITNESS: Yes, sir.

Q Would that make for this black and blue condition which he described extending from the wrist up to the shoulder?

A Yes.

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THE COURT: You mentioned one other word.

Q We are coming to the volar aspect of the left forearm. What is the volar aspect?

A The volar aspect is the inside. The outside is the dorsal aspect. The inside is the volar aspect.

Q So that when they talk about induration and ecchymosis extending to the volar aspect of the left forearm, it would come as I am indicating like this from the shoulder down in this fashion (indicating)?

A That is correct.

THE COURT: Is that right?

THE WITNESS: Yes, sir.

Q You were told, were you not, that he has now retired because of a heart condition?

A Yes.

Q Did you make a physical examination of him on this date and we are talking about when you got this history and you had his previous diagnosis.

A Yes, I did.

Q Would you tell us what your findings were and break it down for laymen talk, as you go along, please?

A The head was slightly turned and tilted toward the left side.

Q What would that indicate or what would that

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2 represent?

3 A Well, in this particular case there was some
4 induration and spasticity of the trapezius muscle in the
5 shoulder which was pulling the head downward and turning
6 the neck toward the left side.

7 Q Continue, please.

8 A There was a marked elevation of the left
9 shoulder and thickening of the left trapezius muscle.

10 Q Where is that and what does that indicate?

11 THE COURT: Stand up and show the jury exactly
12 where it is on yourself.

13 A When I state that there is elevation of the
14 left shoulder, I meant that the shoulder is pulled up in
15 this manner.

16 THE COURT: Show them where the trapezius
17 muscle is.

18 A The Trapezius muscle passes from the base of the
19 skull down the back of the neck and down into the back and
20 out to the shoulder, in the back of the shoulder and over
21 the front of the shoulder.

22 I am sorry, over the top of the shoulder.

23 Q All right.

24 A There was atrophy of the infrascapular muscles
25 and the deltoid muscles. The infrascapular muscles are the

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1 muscles in the -- within the shoulder blade. Those are the
2 muscles within the shoulder blade and the deltoid muscle is
3 the superficial muscle that covers the entire shoulder.
4

5 Q When you say there was atrophy, what does that
6 mean?

7 A That means there was wasting, muscle wasting.

8 Q What would that indicate to you medically?

9 A Disuse.

10 Q Disuse for what reason?

11 A For pain, because of pain.

12 Q In other words, if somebody has pain, he would
13 have a tendency --

14 THE COURT: No, sustained. He testifies.
15 Don't sum it up.

16 Q Let me ask you this, Doctor: If a person has
17 pain in a specific muscle, medically speaking, would that
18 make that patient have a tendency to use that muscle less
19 than you would use it without pain?

20 A Yes.

21 Q If you use it less, would that bring about this
22 atrophy that you say you found?

23 A That is correct.

24 Q Would you continue, please?

25 A Elevation of the left arm was restricted at 120

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degrees.

Q What does that mean?

A That means elevation from the side and from the front. 120 degrees is about 30 degrees beyond this level, something in this manner I would say (indicating).

Q Full elevation would be 180?

A Yes.

Q And his restriction was up to about 120?

A About 120.

Q He couldn't bring it any further up?

A No.

MR. KIMBALL: I ask again and invite Mr. Auslander to reserve his summation for an appropriate time.

MR. AUSLANDER: I am just asking if that is what he means.

Q What else did you find after you found that the elevation was restricted?

A Well, he was unable to maintain the arm at this level of elevation. He could bring it up to 120 degrees, but it would immediately fall after a few seconds.

Q What does that indicate to you?

A This again is due to muscle weakness and muscle wasting.

Q What else did you find, Doctor?

A There was a 30 degree defect in extension.

Q What does that mean?

A That is in bringing the arm backwards (indicating), the opposite arm could be brought back 30 degrees more than could the left arm.

Q All right.

A There was marked restriction of internal rotation which is posterior, rotating the arm backwards.

Q What do you mean by marked restriction?

A I mean it was severe, extensive.

Q All right.

A And in bringing the left hand to the back, he could only bring it to the level of the lower back whereas the right hand reached up to the opposite scapula or shoulder blade.

Q Do you mean, Doctor, that the left hand could only go this far, but the right hand could come all the way up like this?

THE COURT: He will show the jury.

A The left arm could only be brought to this level whereas the right arm reached the normal level to the opposite scapula or shoulder blade (indicating).

Q What else did you find, Doctor?

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2 A There was tenderness over the superior aspect
3 of the shoulder, that is over this area (indicating), and at
4 the junction of the trapezius muscle with the scapula. The
5 muscle that I described before inserts into the shoulder
6 blade at the superior margin here (indicating).

7 There was tenderness to palpation at this area.

8 Adduction of the left arm across the chest was
9 restricted. He was unable to bring the left arm across the
10 chest to the same degree that he could the right. In doing
11 so he complained of a pulling sensation in the shoulder.

12 Q Which would indicate what to you, Doctor?

13 A Well, it would indicate muscle contraction or
14 muscle spasm.

15 Q What is spasm?

16 A Muscle spasm is contraction of muscle.

17 Q Is that a voluntary thing or involuntary?

18 A That is involuntary.

19 Q That is nature's way of protecting --

20 THE COURT: No, let the doctor testify.

21 Q Is that nature's way of protecting pain areas?

22 A That is nature's way of splinting and trying to
23 maintain a painful area at rest.

24 Q All right.

25 A He had difficulty flexing the left elbow against

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1 resistance and there was weakness in the biceps muscle, that
2 is, he could flex the left elbow, but against resistance he
3 couldn't or with great difficulty.
4

5 Q What else did you find?

6 A When he flexed the muscle against resistance,
7 there was fibrillations or vibrations that were visible in
8 the muscle itself.

9 Q What does that indicate to you, Doctor?

10 A That also indicates muscle weakness.

11 Q That isn't a normal condition, is that?

12 A No, it is not.

13 There was tenderness over the medial epicondyle
14 of the elbow at this point (indicating).

15 THE COURT: What is the medial epicondyle?

16 THE WITNESS: This is the little bony protuberance
17 on the inside of the elbow.

18 There was tenderness to bi-digital palpation of
19 the left wrist or in this manner (indicating), with the fore-
20 finger and the thumb and there was a ten degree defect in
21 palmar flexion, flexion in this manner of the wrist
22 (indicating). There was a ten degree defect as compared to
23 the opposite.

24 There was a five degree defect in dorsiflexion
25 or flexing the wrist upward (indicating).

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THE COURT: Go ahead and answer it.

A Yes.

Q There are what we would call, I think, in medicine subjective signs and objective signs, are there not, Doctor?

A Yes.

Q What is the difference between subjective and objective?

A Well, subjective symptoms and signs, of course, are those things that a patient feels and you cannot observe.

Objective are those that you can observe with your senses as an examiner.

Q When you said in your report in some of these findings that the man couldn't raise his arm past here, for example, couldn't put his arm behind his back a certain distance, had a weakness in grasp, could a person fake some of these things if he wanted to?

A Some of them could be faked.

Q On the overall picture, Doctor, of the examination that you made of the man, did you have objective findings of injury when you made your examination of him?

A Yes, I did.

Q Things that could not be faked?

A Yes, I did.

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2 Q On the overall picture did you feel that this
3 man, based upon your experience as a trained examiner, was
4 giving you legitimate complaints?

5 A I did.

6 MR. KIMBALL: Objection, your Honor.

7 THE COURT: Yes, I will sustain that.

8 Q Did you in any way feel that this man was
9 malingering?

10 A No.

11 MR. KIMBALL: Same objection.

12 THE COURT: All right, I will sustain it.

13 Go ahead.

14 Q What was the finding that you made concerning
15 his condition after you made this examination?

16 A I came to a conclusion that he was suffering
17 from a chronic derangement of the left shoulder with weakness
18 of the muscles of the left arm and forearm.

19 Q What do you mean by a chronic derangement?

20 A I mean that the left shoulder as it is constituted
21 is now in a weakened and abnormal anatomical and physiological
22 state.

23 Q When you say abnormal physiological and anatomical
24 state, what do you mean by that in laymen's language?

25 A I mean that the shoulder has residual signs of

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having been severely injured and he has been left with complaints and findings as a result of this injury.

Q Doctor, have you -- do you in your practice make on occasion an estimate of whether a person is permanently or not permanently injured and, if so, whether there is any kind of percentage of permanency that you find in the injury?

A Yes.

Q Did you make such an estimate for Mr. Ruggiero?

A I did.

Q What was it?

A I estimated that he has a permanent loss of use of 20 percent of the left shoulder -- left arm.

Q The left arm, which is part of the shoulder and arm?

A Yes.

Q I take it, then, that if you have a perfect arm and shoulder, you have a hundred percent, that goes without saying?

A That is correct.

Q And he has in your estimation lost 20 percent of that use?

A Yes.

THE COURT: He has already testified to that.

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MR. AUSLANDER: All right.

Q Mr. Ruggiero -- assume that he has testified, because you weren't here, that his arm still hurts him, even though he is not working. He rolls over when he sleeps, bad weather, during the day on occasions, would these complaints that he has made be consistent with the type of injuries that he had, the findings that you made on your examination?

A Yes.

Q Would these type of complaints be justified on the basis of the findings that you made of his physical condition?

A Yes.

Q Doctor, Mr. Ruggiero has testified that following his accident he was under treatment by Dr. Tagliagambe and Dr. Tagliagambe's office is in Brooklyn, as you know, is that correct?

A Yes.

Q Your office is in Brooklyn?

A That is correct, yes.

Q Mr. Ruggiero has testified that he went to see Dr. Tagliagambe three times a week for approximately eleven weeks until he went back to work.

He also testified that on the first examination

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A For the first office visit it would be approximately \$23 and subsequent office visits would be from \$7.50 to \$10.

Q What is the range there, Doctor? Why would one be \$7.50 or \$10? Is there something different that might be accomplished?

A It would be \$7.50, if there happened to be incidental administrations, they might add something to it, but the basic rate is \$7.50.

Q Would there be anything -- all right. I think that is enough.

My rough mathematics brings that to \$270 --

THE COURT: That is summation, counsel.

Q \$7.50 per visit and \$23 for the first visit?

MR. KIMBALL: Objection, repetitious, your Honor.

MR. AUSLANDER: I just want to make sure I got these figures right.

MR. KIMBALL: Without regard to what counsel wants, I object to it as repetitious.

THE COURT: That is what he testified.

MR. AUSLANDER: You may inquire.

CROSS-EXAMINATION

BY MR. KIMBALL:

Q Some of your findings are based upon subjective,

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2 is that correct?

3 A That is correct.

4 Q And to the extent that your findings are based
5 upon subjective, they depend upon truthfulness, is that
6 correct?

7 A Yes.

8 Q Did you, Doctor, make any attempt whatsoever to
9 evaluate the man's truthfulness?

10 A No, except by observation of his attitude as I
11 was examining him.

12 Q Did you accept as being true everything that he
13 told you and everything that he complained about?

14 A No, I tested some of it for myself.

15 Q Did you disbelieve anything that he told you?

16 A No, I didn't.

17 Q Your examination on June 25, 1975 was for the
18 purpose of qualifying yourself to testify, is that correct?

19 A That is correct.

20 Q This is not the first time that you have done
21 such a thing, is it?

22 A No, it is not.

23 Q You knew, of course, that the worse you found
24 the man in your opinion the more likely it was that he would
25 make a recovery? You knew that, did you not?

1 EOd
2 MR. AUSLANDER: I am going to object to that
3 question, your Honor.

4 THE COURT: I will permit it. Go ahead.
5 Do you know?

6 A I assume so.

7 THE COURT: All right.

8 Q Did you testify just last week in this courthouse?

9 A Yes.

10 Q In a case in which Mr. Auslander was representing
11 a plaintiff and I was representing a defendant?

12 A That is correct, yes.

13 Q And there, too, had you made an examination of a
14 plaintiff just a few days before you testified?

15 A That is correct.

16 Q And for the first time?

17 A Yes.

18 Q Can there be a sprain by stretching of ligaments
19 without tearing?

20 A No, by definition there must be some torn fibers.
21 There has got to be a dissolution.

22 Q Are ligaments structures which are capable of
23 being healed?

24 A Not in the true sense. Ligaments contain an
25 abundant amount of elastic tissue. When they are healed,

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they heal only with fibrous tissue or scar tissue. This scar tissue can not be stretched as can the ligamentous tissue.

Q In other words, when they heal, they are not as elastic as they previously were?

A That is correct, yes.

Q Now, is ecchymosis a medical word for a bruise?

A I would say yes to some extent.

Q Does a bruise, which all of us have had at one time or another in our lives, is a bruise visible evidence of some subcutaneous bleeding?

A That is correct, yes.

Q You were permitted to testify that you had examined the official report by Dr. Tagliagambe containing the diagnosis, is that correct?

A I did not see his official report. I had access to the Department of Labor or -- well, he had made this report to the Department of Labor, yes.

Q In other words, you saw the report which the doctor made to the Department containing his diagnosis?

A That is correct, yes.

Q That diagnosis, as you have reviewed it for us, was an acute sprain of the left shoulder and left arm, with induration and ecchymosis extending to the volar aspect of

1 EOd
2 the left forearm, is that correct?

3 A Yes.

4 MR. KIMBALL: I ask this piece of paper be
5 marked for identification as B.

6 (Defendant's Exhibit B marked for identification.)

xvx 7 Q Showing you B, does that piece of paper contain
8 Dr. Tagliagambe's official diagnosis as you saw it, as I
9 have just recited it?

10 A That is correct, yes.

11 Q Is that the official paper which you saw or a
12 copy thereof, or the original thereof?

13 A I don't think this is the one that I saw. No,
14 this isn't, but these are the exact words.

15 Q Do you recognize the piece of paper, is that
16 one of the kinds of official reports which doctors sometimes
17 file with the Department?

18 A Yes, that is an attending physician's report.

19 Q Attending physician's initial report?

20 A That is correct.

21 Q Does it contain a history which the person gave
22 to the attending physician?

23 A Yes.

24 Q You know Dr. Tagliagambe, you say?

25 A Yes.

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2 What is the ground?

3 MR. AUSLANDER: The grounds are that history of
4 this type -- no, I will withdraw the objection. Let it in.

5 (Defendant's Exhibit B received in evidence.)

6 MR. KIMBALL: May I read the history, your
7 Honor?

8 THE COURT: Sure.

9 MR. KIMBALL: Item No. 18: "Employee's account
10 of how injury or exposure to occupational disease occurred."

11 "Answer: Foot of 39th Street. Working on
12 loading ship in hold of Hatch No. 2 aft. While pushing
13 vehicle into place, felt a sharp pain in left shoulder and
14 entire arm. Now complains of induration and discoloration
15 of entire left forearm volar aspect, with pains in shoulder
16 region."

17 Q That is not the history you got, is it, Doctor?

18 A No. That is the history I got, but not as
19 complete as the history that I got.

20 Q You got a history about slipping and falling
21 and striking the left arm and shoulder, didn't you?

22 A Yes.

23 Q That is not the history I read you, is it?

24 A That is not, no.

25 Q Doctor, is it true that your opinion here

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2 expressed concerning causal relationship depended entirely
3 upon your acceptance as truthful of the history which was
4 given you at the time of your examination?

5 A Well, as I compare the two histories, not really.
6 I think that the fact that this man had induration all the
7 way down to the wrist, as described by Dr. Tagliagambe, and
8 injuries to the entire arm and shoulder, would indicate that
9 there is a great deal more happened here than just feeling a
10 pain in the arm. He would have to have fallen on it.

11 Q In other words, you disagree with the history
12 taken by the doctor?

13 A I don't know if Dr. Tagliagambe took the history
14 or his nurse took the history, but --

15 Q Whoever took it, you disagree with it?

16 A I do, yes.

17 Q Did you by chance see any other official reports
18 by Dr. Tagliagambe?

19 MR. KIMBALL: I ask this be marked C for
20 identification, please.

21 (Defendant's Exhibit C marked for identification.)

22 A I don't believe so.

23 Q May I show you C and ask you whether or not you
24 are acquainted by history with the date on which
25 Dr. Tagliagambe reported to the Department that this man --

1 EOd

2 going and we are not going there. I will sustain the
3 objection.

4 MR. KIMBALL: That completes my cross of this
5 witness, your Honor.

6 THE COURT: All right.

7 REDIRECT EXAMINATION

8 BY MR. AUSLANDER:

9 Q Doctor, just so I understand it, the type of
10 injury that Dr. Tagliagambe found, the findings that he made
11 with this black and blue ecchymosis all the way up and down
12 the arm and the hemorrhaging, the induration, would that
13 type of injury come about by just lifting a car and feeling
14 a strain?

15 MR. KIMBALL: Object to the form. Improper
16 redirect.

17 MR. AUSLANDER: That is exactly what you asked
18 him.

19 THE COURT: I will permit it. Go ahead.

20 No, it is inconsistent with it.

21 Q What would be the more consistent history for
22 the type of findings and injury that Dr. Tagliagambe found?

23 R. KIMBALL: Objection, your Honor, hypothetical.

24 MR. AUSLANDER: We have two histories in front
25 of us. Which would be more consistent?

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THE COURT: Go ahead and answer it. I will make the ruling. Answer it.

A That he fell and struck his entire arm.

Q Doctor, Mr. Kimball asked you if you believed him when he said that he couldn't hold on any longer and he started to let go when you asked him to test his grasping power and he asked you whether you believed him when he said he had pain and he couldn't raise his arm any further. Was this belief on your part just because you liked the looks of his face, or was it because of any physical findings that you made which would be consistent with those reactions on his part?

A I would expect it from the findings.

Q So that if he says that he couldn't hold on any longer, that would be because you found that his arm was atrophied, is that right?

MR. KIMBALL: That is summation.

THE COURT: That is what he said. Have you got anything else?

Q Doctor, with the physical findings that you made, would you expect the man to have complaints of pain?

A Yes.

MR. KIMBALL: Objection, improper redirect.

THE COURT: Answer it.

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Campbell-redirect

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A Yes, I would.

MR. AUSLANDER: Thank you, that is all.

THE COURT: Doctor, questions were asked of you before. Are you in the business of needlessly inflicting pain on people?

THE WITNESS: No, sir.

THE COURT: I didn't think so.

Step down.

BY MR. AUSLANDER:

Q Mr. Kimball was asking you whether you were here last week in a trial involving Mr. Kimball and myself and you said yes, is that right?

A Yes.

Q Doctor, thinking back now, isn't it true that the initial treating doctor in that case was also Dr. Tagliagambe, who could not come to court because of his heart attack?

A That is correct, yes.

Q That is why we asked you to come and testify?

A Yes, sir.

MR. AUSLANDER: Thank you, Doctor.

THE COURT: All right. Step down.

(Witness excused.)

THE COURT: Plaintiff rests?

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2 MR. AUSLANDER: Would your Honor please take
3 judicial notice of the fact that according to the life
4 expectancy data as taken from the United States Department of
5 Health, Education & Welfare, Public Health Service, National
6 Center for Health Statistics, Vital Statistics of the United
7 States, Volume No. II, Section 5, a male, white, age 47
8 has a life expectancy of 23.9 years.

9 THE COURT: If that is what it is, I will take
10 judicial notice of it.

11 MR. AUSLANDER: That is what it says here, your
12 Honor.

13 THE COURT: That is all right, but if your copy
14 of it is as bad as mine, it's got to be in tiny little
15 numbers like that. Have you got it here? All right. Make
16 it easy for me.

17 Okay. Yes, I will take judicial notice of that.

18 Both sides rest?

19 MR. AUSLANDER: Yes, sir.

20 THE COURT: All right. Ladies and gentlemen,
21 at this point we have some legal business to handle, so you
22 are going to get an extra about ten minutes on your lunch
23 hour.

24 Madam Clerk, would you escort the jury from the
25 room. Everybody else remain seated.

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AFTERNOON SESSION:

(2:00 o'clock)

(In open court without the presence of the jury.)

THE COURT: I have no requests to charge from plaintiff. Under the circumstances, I assume they are either granted or denied, but they are not going to be given in your words.

MR. AUSLANDER: I have nothing special, your Honor. I didn't think there was anything too unusual in this case that you haven't already encountered in numerous cases.

THE COURT: I had 51 requests from the defendant. Most of them are going to be granted or covered, let's put it that way.

But in my way of doing it. I just cannot perhaps at this late stage of my life learn to use other people's words.

Do you want specific rulings on each one?

MR. KIMBALL: No, your Honor, I don't require any rulings on each one prior to summations. That is not to say that I withdraw any of the requests. I have the intent to await your charge and take my exceptions after your charge.

THE COURT: Fine. Bring in the jury.

(Jury present.)

1 EOd

2 the Court has taken judicial notice of the fact that my
3 client was not sued until two and a half years after this
4 accident, knew nothing at all about it.

5 I took the plaintiff's deposition on
6 December 15, 1972, and I asked him a simple question and I
7 got a simple answer. Page 36, Line 20:

8 "Question: But the particular place where you
9 slipped, did you look at it at the very spot after you fell?

10 "Answer: No, sir.

11 Plaintiff testified here in court that after he
12 look at his arm, he walked around a while, he felt something
13 under his feet, he looked at his shoe and saw some grease or
14 oil which he wiped off with a piece of burlap.

15 During the deposition, as well as at the trial,
16 I asked him, I said, "Was there anything on that plywood
17 like little pieces of dirt or anything like that, a little
18 sand or anything of that nature?

19 "Yes," he said.

20 I said, "Is that stuff slippery under foot?"

21 "Well, I don't know."

22 Plaintiff called a witness, Mr. Gentile, a sur-
23 prising witness. There wasn't a mention of Mr. Gentile in
24 the file in this case. Not a mention of him, but he came in
25 here the first day of trial, was plaintiff's lead-off witness

1 EOd

2 five years after this event and he testified that after the
3 accident, mind you, after the accident, he observed some
4 spots of grease or oil on the main deck of the ship up where
5 he was working and he requested the mate of the ship, who
6 conveniently happened to be around there just waiting to
7 execute orders from Mr. Gentile, he told the mate that he
8 wanted something done about it and the mate did something or
9 other, or caused something to be done about it.

10 We call that testimony in law a recent fabri-
11 cation and I suggest to you that it may very well have been
12 fabricated in the offices of these same lawyers during one or
13 another of the times when Mr. Gentile was there in connection
14 with his own claims, multiple claims of his own.

15 The question also may arise, why call Gentile,
16 apart from his convenience to the lawyers? Why not call some
17 of those hold men in hatch boss LaPore's gang who are still
18 over at 39th Street?

19 Certainly if there had been anything on that
20 piece of plywood, they were right there next to the plaintiff,
21 according to his story, they picked it up off the plywood,
22 they ought to know about it.

23 Then this morning the plaintiff called
24 Dr. Campbell as a medical expert. Something of a professional
25 witness, who examined a few days ago, knowing that it was his

credible evidence that what he says happened is the gospel truth?

Now, I will sit down in just a moment. And I have heard Mr. Auslander sum up before and he has heard me and I always seem to go first and he goes last, and that is quite fair and proper, too, because having the burden of proof, having the client who has the burden of proof, he not only should have the last word, but in some of these cases he badly needs it. This is one of those cases.

But sometimes in an effort to bamboozle or distract the jury but really play on your sympathy, you see if he can get you by your sympathy, then you will do something perhaps irrational. Otherwise stated, you will violate your oath.

You swore in some old king's english when you took the oath, not to let your sympathies influence you. To call the case fair and square. Is the fellow safe at first or was he out at first, without regard to whether you wish he were or weren't.

But particularly in a case of this sort where somebody, somebody, ladies and gentlemen, sat in that chair right under your nose and told falsehoods under oath, you saw it. Somebody had to, didn't they? So in a case such as that, you may hear a lawyer say, usually with arms askew

1 so? Did they do so? Or do they have this whole cavalier
2 attitude, who gives a damn? We are here to make money
3 sending cargo out, shipping it out, we don't care what is
4 happening to these longshoremen. We don't care what is
5 happening.
6

7 But he says, I didn't know about it, my client
8 didn't know about it.

9 He tells you that no one else slipped or fell that
10 day. That is what Mr. Ruggiero said, but we are not claiming
11 that the bottom of this hold was like a skating rink where
12 everyone would be going all around. There were some spots
13 of oil from these cars.

14 Unfortunately he was the one who fell into it.

15 There are in any sidewalk cracks, holes, broken
16 parts, thousands of people walk by every day, but one person
17 falls on it. Does that mean that the whole area is bad? One
18 area is bad and that is what we are claiming, one man
19 happened to fall on it. Is he to be penalized because the
20 rest of his people didn't fall on it? If they did, it
21 wouldn't be Mr. Ruggiero on the stand, we would have 20
22 people here suing him at one time, but one case at a time.

23 Mr. Kimball also read you a part of the
24 questions that he asked him and Mr. Kimball took the effort
25 to file the original in court. It becomes a part of the

1 EOd
2 official court record, it becomes a part of the documents
3 of the Court and he reads you only two questions -- one
4 question and one answer, and he neglects, maybe, to read you
5 the ones that follow, the two or three that follow.

6 For example: "So you can't tell me how big it
7 was?"-- referring to the spot.

8 MR. KIMBALL: If your Honor please, there is no
9 evidence of this.

10 THE COURT: There was no evidence when you read
11 it either, that I remember.

12 MR. KIMBALL: I respectfully disagree with you.
13 In any event, your memory, I suppose, will govern.

14 THE COURT: Go ahead.

15 MR. AUSLANDER: "So you can't tell me how big it
16 was, whether it was as big around as a dime or as big
17 around as the ashtray or as big around as the chair?"

18 He is talking about that spot of oil and he
19 gave the answer: "No, sir."

20 He answered, "It had to be quite a bit."

21 "Why do you say it had to be quite a bit?"

22 "Because I had it on my shoe."

23 "Question: Your left shoe?"

24 "Answer: Yes, sir.

25 "Question: When did you notice that for the

1 EOd

2 first time?

3 "Answer: When I started to walk, I got up and I
4 started to, the men came over, I started moving around."

5 "Question: You could feel it on your shoe?

6 "Answer: Yes, that is right."

7 "Question: What did you do about it?

8 "Answer: I went over with a piece of burlap and
9 I tried to clean it."

10 "Question: Wipe it off the bottom of your shoe?

11 "Answer: That's right, sir."

12 So it isn't just, did you see that one spot,
13 did you know about that one spot and the answer: "No, sir."

14 There were other questions and answers asked of
15 the man, given by the man, that when he got up he felt this
16 under his foot, he looks at it and he wipes it off, the
17 normal thing.

18 Now, he says this is a trial between Mr. Auger
19 and the plaintiff. This isn't a trial between Mr. Auger
20 and the plaintiff. This is a trial between Mr. Ruggiero and
21 Royal Dutch Steamship Co.

22 Mr. Auger was brought in to testify as to what
23 he usually does, what he is supposed to do, what is required
24 of him. Do you really think that he is going to get on the
25 stand, I thought maybe, but do you really think he would get

1 EOd
2 when a judge reacts that way.

3 Now, if you had been right, if I had ignored
4 my responsibilities to the Court and willfully gone outside
5 of the record to read something to this jury, you would be
6 perfectly --

7 THE COURT: You were all over outside of the
8 record. That was clear. It is also clear that there is a
9 doctrine in the law which is called fair reply and that is
10 exactly what was going on.

11 I am somewhat astounded, counselor --

12 MR. KIMBALL: I haven't made my point, so I
13 won't try.

14 THE COURT: You have shown more hostility and
15 animosity towards me personally and toward the Court than I
16 ever have for you. I have given you a fair trial. I will
17 give you a fair charge, but if you ever come back and do it
18 again, you will consider yourself to have been warned once
19 and that is all the warning you get. Do you hear me?

20 MR. KIMBALL: I hear you, but I don't understand
21 you.

22 THE COURT: It's all over the record. What more
23 do you want?

24 (Recess.)
25

Service of One (1) Copy of the
within Supplemental Appendix for
appellee is hereby admitted this 20th
day of February, 1976

Burlingham Underwood & Lord
Attorneys for Appellant